



7800 Shoal Creek Blvd., Ste. 171-E  
Austin, TX 78757  
v/tdd: 512.454.4816  
intake: 800.315.3876  
infoai@advocacyinc.org  
www.advocacyinc.org

## **Testimony to Senate Education Committee August 18, 2008**

My name is Jeff Miller. I am a policy specialist for Advocacy, Inc., the designated protection and advocacy system for Texans with disabilities. Advocacy, Inc. is a federally funded non-profit organization that advocates for the rights of individuals with disabilities, including the approximately 500,000 students who receive special education services. Thank you for the opportunity to address the committee this morning, and thank you for your concern about these issues and your commitment to make education for Texas' children better.

I am also an attorney who has represented students and parents in special education related matters for the last 15 years. Additionally, I am the proud father of an eight-year-old who attends a Texas public school and has received special education services for the last five years. As a result of my background, there are few experiences in the special education world that I have not witnessed or taken part in, from ARD meetings, mediation, due process and federal court complaints.

The Individuals with Disabilities Act (IDEA), is a good law. Since its adoption in 1975, it has resulted in hundreds of thousands of students with disabilities receiving a "Free Appropriate Public Education (FAPE)." While there are many schools across the state in which children with disabilities are well educated, implementation of IDEA is uneven. Unfortunately there are schools that do not provide FAPE to every student and in these cases, parents have to find other ways to ensure that their child's needs are met.

However, many districts are able to successfully implement programs and work through disagreements and differences of opinions with parents. It is imperative, that we focus on the practices and policies that work and use these as models to be replicated in other places. As I share some thoughts and recommendations regarding the due process system from parent/advocate perspective, I would like to begin by briefly discussing role of the dispute resolution process in the IDEA.

Advocacy, Inc. takes its role in addressing the special education system in Texas seriously. We have been working with numerous parents, attorneys, and educators to help identify problems in the system. Additionally, I would just like to acknowledge we have been asked by Senators Van de Putte, Zaffirini, Watson, and Lucio's staff to address these issues and I believe that we have all been working with your staff as well, Senator Shapiro. Texas is a large state with diverse cultures and geography; however, while this may add to the challenges this committee faces, we must all work together to ensure that every school is equipped to provide an appropriate education to every student with a disability.

First of all, it is important to understand that parents have a perception that there is an inequity in the special education and dispute resolution processes. Parents believe that there are inequities in access to information, access to representation, access to funds and believe that the current process favors school districts. Unfortunately, some school districts give others a bad reputation. While I have been fortunate enough to witness some great districts take the time and resources necessary to provide great special education services, I have also witnessed others that do not. I have seen parents "yelled at" by district

personnel, given misleading or false information, districts delaying meetings and decisions, districts failing to follow proper procedures and regulations and simply “bullying” parents. It is vital that these issues are addressed and that a process is in place to ensure that special education is consistently provided to every eligible student in Texas.

The IDEA is based on the fundamental premise that parents and schools, when working cooperatively together, are uniquely suited to make the best decisions regarding the appropriate educational decisions for students. The development of an Individualized Educational Program (IEP) is the central process for assuring the development of appropriate educational programs for children who qualify for IDEA services. Building a partnership between parents and school personnel is necessary for IEP development and is at the heart of making the IDEA work. When parents and educators see themselves as partners, they cooperate in the design of the student's IEP.

Because parents and school personnel may not share identical perceptions of a child or educational goals for a student and because parent and educators roles are not the same, disputes are inevitable and normal. The partnership and cooperation between parents and educators usually provides a basis for resolving disagreements. However, sometimes the parties are unable to resolve their disputes. In these cases when parents and schools are unable to agree about what is best for a student, the IDEA provides the right the due process hearing system to resolve disagreements. Unfortunately, because of its nature, there are a number of philosophical and practical disadvantages, associated with the use of due process hearings to resolve disputes under IDEA.

Due process hearings require significant amounts of financial and human resources. The costs associated with due process hearings make them unattractive options for schools and families. Moreover, due process hearings are focused on fact finding and are generally unresponsive to the emotional aspects of disagreements between families and schools. Conflicts between parents and teachers are highly emotional and what often begins as miscommunication or a misunderstanding can become a multi-layered conflict with slights, hurts and tremendous emotional charge on both sides. Since the hearing process is not designed to address these issues, the parties are likely to experience increased frustration.

The bottom line is that due process hearings create adversaries. Once a district is notified that a parent has requested a hearing, communication becomes strained and negotiations constrained. As parents, teachers, and school administrators prepare for a hearing, relationships can be damaged and the ability to work collaboratively following a hearing can be severely compromised. Further, when a due process hearing is requested, attorneys become involved. Attorneys naturally focus discussions on rights, responsibilities and legal process. In many cases, however, the issues of respect, communication and the perception of fairness are necessary for an efficient resolution of a disagreement, these are not normally an attorney's focus.

The partnerships envisioned by IDEA do not flourish in an atmosphere characterized by compliance and enforcement. Many parents, who have participated in due process hearings, even if they "won," say the cost was too high. In my opinion, normally the only way that a parent wins is to avoid due process.

### **Parent Training**

One way to avoid the need for an adversarial due process situation is to improve access to information so those parents are more prepared to participate in the special education process. This would include training for parents (and teachers) regarding their rights, the special education process; and reasonable

expectations for their children's education. If parents know their rights are what they should reasonably expect, and school personnel know that a parent is informed, often conflicts can be avoided or resolved. While training is available in some places, there needs to be incentives to for districts and/or Education Service centers to actively partner with local parent and advocacy groups to provide training for parents on the special education process.

### **Establishing Alternatives to the Current Dispute Resolution Options**

According to the Consortium for Appropriate Dispute Resolution in Special Education (CADRE), if parents and school districts can access a less damaging, less polarizing and more responsive process, they might be willing to use it sooner, and save time, emotions and dollar. In response to the problems inherent in due process hearings, many states have developed alternative dispute resolution methods. These resolution processes address mutual concerns without doing additional harm to individuals and relationships allow parents and schools to make constructive, ongoing contributions to resolutions that affect them, and are responsive to the needs of diverse populations. These alternatives seek to preserve or restore relationships between parents and educators in order to enhance those partnerships, which are so vital to every student's educational program.

CADRE has conducted much research into effective alternatives to the current dispute resolution options and many states have adopted these alternatives. Current alternatives to due process being successfully implemented in other states include:

Facilitation of IEPs: IEP meeting facilitation is quickly becoming one of the most recognized strategies for improving the effectiveness and efficiency of IEP meetings. The purpose of the facilitation process is to develop and sustain collaborative relationships between team members and to preserve and maintain a productive relationship between families and schools. In a facilitated IEP meeting, trained facilitator assists members of the ARD develop or review a student's IEP and address differing opinions. The focus of a facilitated IEP meeting is on the present and future needs of the student and allows team members to focus on the student's education in a collaborative and respectful manner. Providing IEP facilitation when a possible disagreement is contemplated, such as at the 10 day recess ARD, could help ensure the IDEA process is correctly followed, the focus of the meeting stays on the needs of the student and the lines of communication stay open.

Ombudsperson Program: Providing a parent liaison or an ombudsperson, not directly connected with the school district, would allow parents the opportunity to have someone they trust answer their questions, listen to them or help them understand the special education process. A special education Ombudsman could provide information to help families and educators understand state and federal laws, rules, regulations, and to access training and support, technical information services, and mediation services, as appropriate. An Ombudsman would be an impartial and objective individual who could assist all parties to help ensure that students with special needs receive services and supports necessary to enable them to benefit from public education, as guaranteed under federal and state laws.

Meaningful Mediation: Mediation can be an effective alternative to due process and can assist parties to settle disputes without destroying relationships. Unfortunately, because mediation is voluntary, it is underutilized. Often, a school district will not agree to a parent's request to mediate a disagreement until after the parent files a due process hearing request. By that time, often the damage to the relationship between the school and parent is already done. There needs to be incentives for districts to resolve

conflicts without a formal complaints or hearing requests. Providing districts with some sort of incentive to participate in mediation or other form of ADR, would go a long way in reforming our process in Texas.

Early Assistance Program (EAP): States like Montana have developed a Special Education Early Assistance Program. The EAP provides technical assistance to parents, school districts, and advocacy organizations, related to the delivery of a free appropriate public education for students with disabilities. The Early Assistance Program Director is available to intercede prior to or at the time of filing a formal complaint. The EAP Director gathers information pertinent to the situation and attempts to resolve an issue within 15 school days.

Improved Complaint System: The current Tea complaint system often does not provide adequate protections for students. Because of the timelines involved, the complaint system can be used as a means of stalling a parent. Additionally, even if a district is found not to be in compliance with the IDEA, districts are given wide latitude a great amount of time to correct their non-compliance. Further, in some instances it appears that school districts have initiated due process hearings in retaliation for a parent filing a state complaint.

The state complaint process needs to be more accountable and transparent. Complaint data from districts needs to be collected by TEA and made easily available to the public. Additionally, alternative dispute resolution methods need to be made part of the complaint process and incentives provided to districts to resolve conflicts via these avenues.

## **Improving the Due Process Hearing System**

Even with alternatives to due process, there will be situations that cannot be resolved without a due process hearing. Therefore, some things must be done to address our current system. Parents believe that the current system is biased against them and that parents rarely win on the substantive issues. Parents see schools spending large sums of money on legal fees in due process hearings, while children are not receiving needed services. Because of the inequity in the system, when there is a dispute, parents tend to give up, take their child out of school or go through a due process hearing unsuccessfully.

In addition to improving communication and adding more alternatives to due process, the system itself needs reform to ensure fairness. The current Due Process Hearing system could be made fairer by;

Moving Due Process Hearings to State Office of Administrative Hearings (SOAH): As discussed earlier, many parents believe that the due process system as currently operated by TEA is unfair. This dissatisfaction is fueled by the low percentage of parents that prevail on substantive issues in due process. Additionally, the appearance of bias is exacerbated by TEA's practice of allowing special education hearing offices to contract with school districts to conduct other hearings. We believe that this creates a conflict of interest since those districts may become parties to a special education dispute before the same hearing officer. This would not occur if the hearings were conducted by SOAH. It is becoming increasingly difficult for parents to find or afford attorneys to take their special education cases. The system, operated by TEA, has done little to make the system easier to use by pro se parents. There are some individual hearing officers who have spent time assisting parents, but this is

nothing they are required to do. SOAH, has staff available to speak with and assist pro se litigants. This option was recommended by the Sunset Commission in 2005, and we believe that it is still a good idea.

Moving the hearing process to SOAH will not “fix” the due process system. Unfortunately, as long as schools can refuse to mediate disputes, be represented by an attorney when parents are not, and spend money on legal fees and appeals, the playing field will not be level. However, such a move would serve to break up a system that is broken. It would move the hearing from a place perceived to be biased to one that was established by the state specifically to be neutral.

Burden of Proof: In November 2005, the United States Supreme Court ruled in Schaffer v. Weast that the burden of proof lies with the party seeking relief. Notably, however, the Court made it clear that states might still choose to place the burden on schools through legislation.

We believe that the burden of proof should be on school districts. First, school districts are in a far better position to bear the burden of proof than families. Schools districts have better access to information about which programming options are available and effective for a child. Accordingly, they are in a better position to bear the burden of proving that the program they have designed is, in fact, an appropriate education for the child. Second, allowing the burden to remain on parents, who are already disadvantaged in the process, significantly impedes their ability to enforce their child’s educational rights under the IDEA. Finally, allocating the burden of proof to school districts will not place an undue burden on school districts. The IDEA expressly requires a school district to provide and maintain a detailed account of IEP development and implementation. Since the school district must maintain such records, bearing the burden of proof in due process hearings would not impose any additional burden on the school. If the challenged IEP is truly adequate, a presentation of the documented plan and progress should be sufficient to carry the burden of proof.

Justice Ginsberg clearly articulated, in her dissent in Weast, the policy reasons for retaining the burden of proof in special education cases with School Districts. Justice Ginsberg noted that, “In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to relevant information, greater control over potentially more witnesses (those who have been directly involved with the child’s education), and greater overall educational expertise than the parents.”

Statute of Limitations: IDEA 2004, established that requests for an impartial due process hearing must be made within two years of the date the parent or school district knew, or should have known, about the alleged action that forms the basis of the due process hearing request. However, if a state has an established time limitation for requesting a hearing, that time limitation applies. Texas has established a one-year statute of limitation, but this can result in students’ conflicts not being resolved. Parents attempt to work with schools to resolve differences regarding students’ educational programs. By the time that a parent has determined the need for formal dispute resolution, the parent may have had to request several ARD meetings, made formal requests for records from the school that may necessitate OAG opinions and other delays. Often, by the time all of these processes have played out, the one-year statute has run, and a student’s claim for compensatory education has been lost. We believe that adopting a two year statute would better allow parents to protect their children’s’ rights and be more consistent with federal law.

Lay Advocates: Allowing Lay Advocates to represent parents who are unable to find and/or afford an attorney. Allowing lay advocates to be available for parents is essential to the special education process.

Many parents cannot afford to have an attorney present and therefore must represent themselves. This places parents at a clear disadvantage in this respect since the hearings themselves rely on the law, both state and federal, to govern their outcomes. Additionally, many parents do not have experience outside their own in special education and an advocate can bring that perspective to the hearing. Finally, lay advocates can have a positive impact on due process. They can give a parent perspective on both sides of the issue that the parent might not otherwise have.

The Texas Organization of Parents, Attorneys and Advocates (TOPAA), strongly supports this recommendation. There are advocates in the state that already assist parents with other parts of the special education process. By allowing these lay advocates to represent parents in due process hearings, many more parents may have meaningful access to the due process hearing system. Additionally, if parents have access to representation, some schools may choose to settle disputes instead of going through the hearing process.

### **TEA Monitoring**

It is crucial for the success of the IDEA in all of Texas, that schools are held accountable for IDEA implementation. Therefore, TEA must effectively monitor IDEA implementation and school outcomes for special education students. TEA should also increase its role in monitoring the dispute resolution process and holding local districts accountable. This could include collecting data regarding the number of complaints and hearings, the outcomes and cost, etc. This information should then be made easily accessible by parents and advocates. If local districts believe that TEA is meaningfully monitoring special education outcomes and dispute resolution, we believe that positive changes will occur.

### **Planning / Transition**

Planning in advance is important to help avoid potential misunderstandings and conflicts, as well ensure an appropriate program. Unfortunately, it appears that meaningful planning for transition to after school is not happening for many students with disabilities.

Schools should ensure that parents of students with disabilities are informed about SSI, work incentives, the adult service system and how to access it. We also believe it is important to require transition planning beginning at age 14 when a student enters high school in order to provide sufficient time to successfully plan transition to life after high school. Additionally, the use of person centered planning techniques can help a school understand all of the needs of a student. This process can let a student's strengths, needs and interests drive the transition planning process. We also support the recommendations of HB 1230 workgroup, specifically the collection of more data and adding monitoring indicators to measure what schools are providing students with disabilities before they leave school in order to prepare them for employment and independent living.

The IDEA is a good law that has literally transformed the lives of children with disabilities and their families. Since its enactment, millions of children with disabilities have received appropriate special education and related services thanks to the enactment and implementation of the IDEA. However, it is also important to note that parents believe that the system is biased and unfair. These perceived inequities need to be addressed. We need to work together to concentrate on improving special education in all public schools.

Thank you for allowing me to testify.

Jeffrey S. Miller, Policy Specialist  
Advocacy Incorporated  
7800 Shoal Creek Boulevard, Suite 171-E  
Austin, Texas 78757-1024